

**In re: ERICA NICOLE deHAAN, FORMERLY KNOWN AS ERICA NICOLE MASHBURN,
FORMERLY KNOWN AS ERICA NICOLE AVERY, AN INDIVIDUAL, d/b/a BUNDLE OF JOY
KENNEL; AND RICKY deHAAN, AN INDIVIDUAL.**

AWA Docket No. 04-0004.

Decision and Order as to Erica Nicole deHaan filed August 18, 2004.

AWA – Animal Welfare Act – Failure to file answer – Waiver of right to hearing – Default – Admission during teleconference – Dealer – Civil penalty – Cease and desist order.

The Judicial Officer affirmed two decisions issued by Administrative Law Judge Jill S. Clifton finding that Erica Nicole deHaan (Respondent) operated as a dealer, as defined in 7 U.S.C. § 2132(f) and 9 C.F.R. § 1.1, without an Animal Welfare Act license, in willful violation of 7 U.S.C. § 2134 and 9 C.F.R. § 2.1(a)(1). The Judicial Officer held, pursuant to 7 U.S.C. § 2149(b), each dog Respondent sold and each day during which Respondent sold dogs without an Animal Welfare Act license constituted a separate violation, and the Judicial Officer increased the \$3,840 civil penalties assessed against Respondent by the ALJ to \$18,000. The Judicial Officer stated Respondent's failure to file a timely answer is deemed an admission of the allegations in the Complaint (7 C.F.R. § 1.136(c)) and constitutes a waiver of hearing (7 C.F.R. § 1.139). In addition, the Judicial Officer based the decision on Respondent's admissions, during a teleconference with the ALJ and counsel for Complainant, that she committed violations alleged in the Complaint to have been committed by another respondent.

Bernadette R. Juarez for Complainant.

Respondent Erica Nicole deHaan, Pro se.

Initial decisions issued by Jill S. Clifton, Administrative Law Judge.

Decision and Order as to Erica Nicole deHaan issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

The Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding by filing a "Complaint" on December 5, 2003. Complainant instituted the proceeding under the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159) [hereinafter the Animal Welfare Act]; the regulations and standards issued under the Animal Welfare Act (9 C.F.R. §§ 1.1-3.142) [hereinafter the Regulations and Standards]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice].

Complainant alleges: (1) on April 1, 2003, and April 8, 2003, Respondent Ricky deHaan operated as a dealer, as defined in the Animal Welfare Act, without an Animal Welfare Act license, in willful violation of section 4 of the Animal Welfare Act (7 U.S.C. § 2134) and section 2.1(a)(1) of the Regulations and Standards (9 C.F.R. § 2.1(a)(1)); and (2) on June 3, 2003, June 10, 2003, July 1, 2003, July 8, 2003, July 29, 2003, August 5, 2003, August 6, 2003, August 12, 2003, August 13, 2003, August 19, 2003, August 20, 2003, August 21, 2003, August 26, 2003, October 6, 2003, October 7, 2003, and October 14, 2003, and on or about September 30, 2003, and October 6, 2003, Respondent Erica Nicole deHaan operated as a dealer, as defined in the Animal Welfare Act, without an Animal Welfare Act license, in willful violation of section 4 of the Animal Welfare Act (7 U.S.C. § 2134) and section 2.1(a)(1) of the Regulations and Standards (9 C.F.R. § 2.1(a)(1)) (Compl. ¶¶ 4-26).

The Hearing Clerk served Respondent Ricky deHaan and Respondent Erica Nicole deHaan with the Complaint, the Rules of Practice, and a service letter on December 13, 2003.¹ Neither Respondent Ricky deHaan nor Respondent Erica Nicole deHaan filed an answer to the Complaint within 20 days after service as required by section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)).

On January 8, 2004, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Complainant filed a "Motion for Adoption of Decision and Order as to Erica Nicole deHaan By Reason of Admission of Facts" [hereinafter Motion for Default Decision] and a proposed "Decision and Order as to Erica Nicole deHaan By Reason of Admission of Facts" [hereinafter Proposed Default Decision]. On January 21, 2004, the Hearing Clerk served Respondent Erica Nicole deHaan with Complainant's Motion for Default Decision and Complainant's Proposed Default Decision.² On January 26, 2004, Respondent Erica Nicole deHaan filed two motions to dismiss, and on February 4, 2004, Complainant filed "Complainant's Response to Respondent's

¹United States Postal Service Domestic Return Receipts for Article Number 7001 0360 0000 0304 6569 and Article Number 7001 0360 0000 0304 6552.

²United States Postal Service Track & Confirm for Article Number 7001 0360 0000 0310 4030.

Motions to Dismiss Complaint.”

On March 25, 2004, pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Administrative Law Judge Jill S. Clifton [hereinafter the ALJ] issued a “Decision and Order by Reason of Admission of Facts, as to Erica Nicole deHaan, formerly known as Erica Nicole Mashburn, formerly known as Erica Nicole Avery, an individual, doing business as Bundle of Joy Kennel” [hereinafter First Initial Decision and Order]: (1) concluding that Respondent Erica Nicole deHaan willfully violated the Animal Welfare Act and the Regulations and Standards as alleged in the Complaint; (2) directing Respondent Erica Nicole deHaan to cease and desist from violating the Animal Welfare Act and the Regulations and Standards; and (3) assessing Respondent Erica Nicole deHaan a \$3,480 civil penalty (First Initial Decision and Order at 4-8).

On April 5, 2004, the ALJ issued a “Second Decision and Order by Reason of Admission of Facts, as to Erica Nicole deHaan, formerly known as Erica Nicole Mashburn, formerly known as Erica Nicole Avery, an individual, doing business as Bundle of Joy Kennel” [hereinafter Second Initial Decision and Order]: (1) stating she conducted a teleconference with Respondent Erica Nicole deHaan and counsel for Complainant in which Respondent Erica Nicole deHaan took responsibility for the violations of the Animal Welfare Act and the Regulations and Standards alleged in the Complaint to have been committed by Respondent Ricky deHaan; (2) concluding Respondent Erica Nicole deHaan committed the violations of the Animal Welfare Act and the Regulations and Standards alleged in the Complaint to have been committed by Respondent Ricky deHaan; (3) directing Respondent Erica Nicole deHaan to cease and desist from violating the Animal Welfare Act and the Regulations and Standards; and (4) assessing Respondent Erica Nicole deHaan a \$360 civil penalty (Second Initial Decision and Order at 1, 4-6).

On April 19, 2004, Complainant appealed to the Judicial Officer. Respondent Erica Nicole deHaan failed to file a response to Complainant’s appeal petition, and on June 2, 2004, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

Based upon a careful review of the record, I agree with the ALJ’s First Initial Decision and Order and Second Initial Decision and Order, except for the amount of the civil penalty the ALJ assessed against Respondent Erica Nicole deHaan. Therefore, except for the amount of the civil penalty assessed against Respondent Erica Nicole deHaan and minor modifications, I adopt the ALJ’s First Initial Decision and Order and Second Initial Decision and Order as the final Decision and Order as to Erica Nicole deHaan. Additional conclusions by the Judicial Officer follow the ALJ’s conclusions of law as restated.

APPLICABLE STATUTORY AND REGULATORY PROVISIONS

7 U.S.C.:

TITLE 7—AGRICULTURE

....

CHAPTER 54—TRANSPORTATION, SALE, AND HANDLING OF CERTAIN ANIMALS

§ 2131. Congressional statement of policy

The Congress finds that animals and activities which are regulated under this chapter are either in interstate or foreign commerce or substantially affect such commerce or the free flow thereof, and that regulation of animals and activities as provided in this chapter is necessary to prevent and eliminate burdens upon such commerce and to effectively regulate such commerce, in order—

- (1) to insure that animals intended for use in research facilities or for exhibition purposes or for use as pets are provided humane care and treatment;
- (2) to assure the humane treatment of animals during transportation in commerce; and
- (3) to protect the owners of animals from the theft of their animals by preventing the sale or use of animals which have been stolen.

The Congress further finds that it is essential to regulate, as provided in this chapter, the transportation, purchase, sale, housing, care, handling, and treatment of animals by carriers or by persons or organizations engaged in using them for research or experimental purposes or for exhibition purposes or holding them for sale as pets or for any such purpose or use.

§ 2132. Definitions

When used in this chapter—

....

(f) The term “dealer” means any person who, in commerce, for compensation or profit, delivers for transportation, or transports, except as a carrier, buys, or sells, or negotiates the purchase or sale of, (1) any dog or other animal whether alive or dead for research, teaching, exhibition, or use as a pet, or (2) any dog for hunting, security, or breeding purposes, except that this term does not include—

(i) a retail pet store except such store which sells any animals to a research facility, an exhibitor, or a dealer; or

(ii) any person who does not sell, or negotiate the purchase or sale of any wild animal, dog, or cat, and who derives no more than \$500 gross income from the sale of other animals during any calendar year[.]

§ 2134. Valid license for dealers and exhibitors required

No dealer or exhibitor shall sell or offer to sell or transport or offer for transportation, in commerce, to any research facility or for exhibition or for use as a pet any animal, or buy, sell, offer to buy or sell, transport or offer for transportation, in commerce, to or from another dealer or exhibitor under this chapter any animals, unless and until such dealer or exhibitor shall have obtained a license from the Secretary and such license shall not have been suspended or revoked.

§ 2149. Violations by licensees

....

(b) Civil penalties for violation of any section, etc.; separate offenses; notice and hearing; appeal; considerations in assessing penalty; compromise of penalty; civil action by Attorney General for failure to pay penalty; district court jurisdiction; failure to obey cease and desist order

Any dealer, exhibitor, research facility, intermediate handler, carrier, or operator of an auction sale subject to section 2142 of this title, that violates any provision of this chapter, or any rule, regulation, or standard promulgated by the Secretary thereunder, may be assessed a civil penalty by the Secretary of not more than \$2,500 for each such violation, and the Secretary may also make an order that such person shall cease and desist from continuing such violation. Each violation and each day during which a violation continues shall be a separate offense. No penalty shall be assessed or cease and desist order issued unless such person is given notice and opportunity for a hearing with respect to the alleged violation, and the order of the Secretary assessing a penalty and making a cease and desist order shall be final and conclusive unless the affected person files an appeal from the Secretary’s order with the appropriate United States Court of Appeals. The Secretary shall give due consideration to the appropriateness of the penalty with respect to the size of the business of the person involved, the gravity of the violation, the person’s good faith, and the history of previous violations. . . .

(c) Appeal of final order by aggrieved person; limitations; exclusive jurisdiction of United States Courts of Appeals

Any dealer, exhibitor, research facility, intermediate handler, carrier, or operator of an auction sale subject to section 2142 of this title, aggrieved by a final order of the Secretary issued pursuant to this section may, within 60 days after entry of such an order, seek review of such order in the appropriate United States Court of Appeals in accordance with the provisions of sections 2341, 2343 through 2350 of title 28, and such court shall have exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of the Secretary's order.

§ 2151. Rules and regulations

The Secretary is authorized to promulgate such rules, regulations, and orders as he may deem necessary in order to effectuate the purposes of this chapter.

7 U.S.C. §§ 2131, 2132(f), 2134, 2149(b)-(c), 2151.

28 U.S.C.:

TITLE 28—JUDICIARY AND JUDICIAL PROCEDURE

....

PART VI—PARTICULAR PROCEEDINGS

....

CHAPTER 163—FINES, PENALTIES AND FORFEITURES

§ 2461. Mode of recovery

....

FEDERAL CIVIL PENALTIES INFLATION ADJUSTMENT

SHORT TITLE

SECTION 1. This Act may be cited as the “Federal Civil Penalties Inflation Adjustment Act of 1990”.

FINDINGS AND PURPOSE

SEC. 2. (a) FINDINGS.—The Congress finds that—

(1) the power of Federal agencies to impose civil monetary penalties for violations of Federal law and regulations plays an important role in deterring violations and furthering the policy goals embodied in such laws and regulations;

(2) the impact of many civil monetary penalties has been and is diminished due to the effect of inflation;

(3) by reducing the impact of civil monetary penalties, inflation has weakened the deterrent effect of such penalties; and

(4) the Federal Government does not maintain comprehensive, detailed accounting of the efforts of Federal agencies to assess and collect civil monetary penalties.

(b) PURPOSE.—The purpose of this Act is to establish a mechanism that shall—

(1) allow for regular adjustment for inflation of civil monetary penalties;

(2) maintain the deterrent effect of civil monetary penalties and promote

compliance with the law; and

(3) improve the collection by the Federal Government of civil monetary penalties.

DEFINITIONS

SEC. 3. For purposes of this Act, the term—

(1) “agency” means an Executive agency as defined under section 105 of title 5, United States Code, and includes the United States Postal Service;

(2) “civil monetary penalty” means any penalty, fine, or other sanction that—

(A)(i) is for a specific monetary amount as provided by Federal law;

or

(ii) has a maximum amount provided for by Federal law; and

(B) is assessed or enforced by an agency pursuant to Federal law; and

(C) is assessed or enforced pursuant to an administrative proceeding or a civil action in the Federal courts; and

(3) “Consumer Price Index” means the Consumer Price Index for all-urban consumers published by the Department of Labor.

CIVIL MONETARY PENALTY INFLATION ADJUSTMENT REPORTS

SEC. 4. The head of each agency shall, not later than 180 days after the date of enactment of the Debt Collection Improvement Act of 1996 [Apr. 26, 1996], and at least once every 4 years thereafter—

(1) by regulation adjust each civil monetary penalty provided by law within the jurisdiction of the Federal agency, except for any penalty (including any addition to tax and additional amount) under the Internal Revenue Code of 1986 [26 U.S.C. 1 et seq.], the Tariff Act of 1930 [19 U.S.C. 1202 et seq.], the Occupational Safety and Health Act of 1970 [29 U.S.C. 651 et seq.], or the Social Security Act [42 U.S.C. 301 et seq.], by the inflation adjustment described under section 5 of this Act; and

(2) publish each such regulation in the Federal Register.

COST-OF-LIVING ADJUSTMENTS OF CIVIL MONETARY PENALTIES

SEC. 5. (a) ADJUSTMENT.—The inflation adjustment under section 4 shall be determined by increasing the maximum civil monetary penalty or the range of minimum and maximum civil monetary penalties, as applicable, for each civil monetary penalty by the cost-of-living adjustment. Any increase determined under this subsection shall be rounded to the nearest—

(1) multiple of \$10 in the case of penalties less than or equal to \$100;

(2) multiple of \$100 in the case of penalties greater than \$100 but less than or equal to \$1,000;

(3) multiple of \$1,000 in the case of penalties greater than \$1,000 but less than or equal to \$10,000;

(4) multiple of \$5,000 in the case of penalties greater than \$10,000 but less than or equal to \$100,000;

(5) multiple of \$10,000 in the case of penalties greater than \$100,000 but less than or equal to \$200,000; and

(6) multiple of \$25,000 in the case of penalties greater than \$200,000.

(b) DEFINITION.—For purposes of subsection (a), the term “cost-of-living adjustment” means the percentage (if any) for each civil monetary penalty by which—

(1) the Consumer Price Index for the month of June of the calendar year preceding the adjustment, exceeds

(2) the Consumer Price Index for the month of June of the calendar year in which the amount of such civil monetary penalty was last set or adjusted pursuant to law.

ANNUAL REPORT

SEC. 6. Any increase under this Act in a civil monetary penalty shall apply only to violations which occur after the date the increase takes effect.

LIMITATION ON INITIAL ADJUSTMENT.—The first adjustment of a civil monetary penalty . . . may not exceed 10 percent of such penalty.

28 U.S.C. § 2461 (note).

7 C.F.R.:

TITLE 7—AGRICULTURE

SUBTITLE A—OFFICE OF THE SECRETARY OF AGRICULTURE

. . . .

PART 3—DEBT MANAGEMENT

. . . .

SUBPART E—ADJUSTED CIVIL MONETARY PENALTIES

§ 3.91 Adjusted civil monetary penalties.

(a) *In general.* The Secretary will adjust the civil monetary penalties, listed in paragraph (b), to take account of inflation at least once every 4 years as required by the Federal Civil Penalties Inflation Adjustment Act of 1990 (Pub. L. No. 101-410), as amended by the Debt Collection Improvement Act of 1996 (Pub. L. No. 104-134).

(b) *Penalties*—. . . .

. . . .

(2) *Animal and Plant Health Inspection Service.* . . .

. . . .

(v) Civil penalty for a violation of Animal Welfare Act, codified at 7 U.S.C. 2149(b), has a maximum of \$2,750; and knowing failure to obey a cease and desist order has a civil penalty of \$1,650.

7 C.F.R. § 3.91(a), (b)(2)(v).

9 C.F.R.:

TITLE 9—ANIMALS AND ANIMAL PRODUCTS

CHAPTER I—ANIMAL AND PLANT HEALTH INSPECTION SERVICE, DEPARTMENT OF AGRICULTURE

SUBCHAPTER A—ANIMAL WELFARE

PART 1—DEFINITION OF TERMS

§ 1.1 Definitions.

For the purposes of this subchapter, unless the context otherwise requires, the following terms shall have the meanings assigned to them in this section. The singular form shall also signify the plural and the masculine form shall also signify the feminine. Words undefined in the following paragraphs shall have the meaning attributed to them in general usage as reflected by definitions in a standard dictionary.

....

Dealer means any person who, in commerce, for compensation or profit, delivers for transportation, or transports, except as a carrier, buys, or sells, or negotiates the purchase or sale of: Any dog or other animal whether alive or dead (including unborn animals, organs, limbs, blood, serum, or other parts) for research, teaching, testing, experimentation, exhibition, or for use as a pet; or any dog at the wholesale level for hunting, security, or breeding purposes. This term does not include: A retail pet store, as defined in this section, unless such store sells any animal to a research facility, an exhibitor, or a dealer (wholesale); any retail outlet where dogs are sold for hunting, breeding, or security purposes; or any person who does not sell or negotiate the purchase or sale of any wild or exotic animal, dog, or cat and who derives no more than \$500 gross income from the sale of animals other than wild or exotic animals, dogs, or cats, during any calendar year.

PART 2—REGULATIONS

SUBPART A—LICENSING

§ 2.1 Requirements and application.

(a)(1) Any person operating or desiring to operate as a dealer, exhibitor, or operator of an auction sale, except persons who are exempted from the licensing requirements under paragraph (a)(3) of this section, must have a valid license. A person must be 18 years of age or older to obtain a license. A person seeking a license shall apply on a form which will be furnished by the AC Regional Director in the State in which that person operates or intends to operate. The applicant shall provide the information requested on the application form, including a valid mailing address through which the licensee or applicant can be reached at all times, and a valid premises address where animals, animal facilities, equipment, and records may be inspected for compliance. The applicant shall file the completed application form with the AC Regional Director.

9 C.F.R. §§ 1.1; 2.1(a)(1).

ADMINISTRATIVE LAW JUDGE'S FIRST INITIAL DECISION AND ORDER AND SECOND INITIAL DECISION AND ORDER (AS RESTATED)

Statement of Case

Respondent Erica Nicole deHaan failed to file an answer within the time prescribed in section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)). Section 1.136(c) of the Rules of Practice (7 C.F.R. § 1.136(c)) provides that the failure to file an answer within the prescribed time provided in section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)) and the failure to deny or otherwise respond to an allegation in the complaint shall be deemed, for purposes of the proceeding, an admission of the allegations in the complaint. Further, pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), the failure to file and answer constitutes a waiver of hearing. This Decision and Order as to Erica Nicole deHaan is issued pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139) and is issued based on Respondent Erica Nicole deHaan's admissions during the

April 5, 2004, teleconference with the ALJ and counsel for Complainant.³

Findings of Fact

1. Respondent Erica Nicole deHaan, doing business as Bundle of Joy Kennel, an unincorporated association, is an individual whose mailing address is Rt. #3, Box 209-A, Ava, Missouri 65608.
2. Respondent Erica Nicole deHaan, at all times material to this proceeding, operated as a dealer as defined in section 2(f) of the Animal Welfare Act (7 U.S.C. § 2132(f)) and section 1.1 of the Regulations and Standards (9 C.F.R. § 1.1).
3. On April 1, 2003, Respondent Erica Nicole deHaan operated as a dealer, as defined in the Animal Welfare Act and the Regulations and Standards, without an Animal Welfare Act license, and sold, in commerce, three Labradors, four Pugs, and three Eskimos to Puppy Love of Virginia, Inc., for resale, for use as pets.
4. On April 8, 2003, Respondent Erica Nicole deHaan operated as a dealer, as defined in the Animal Welfare Act and the Regulations and Standards, without an Animal Welfare Act license, and sold, in commerce, one Pug and one Golden Retriever to Puppy Love of Virginia, Inc., for resale, for use as pets.
5. On June 3, 2003, Respondent Erica Nicole deHaan operated as a dealer, as defined in the Animal Welfare Act and the Regulations and Standards, without an Animal Welfare Act license, and sold, in commerce, four Boston Terriers to Puppy Love of Virginia, Inc., for resale, for use as pets.
6. On June 10, 2003, Respondent Erica Nicole deHaan operated as a dealer, as defined in the Animal Welfare Act and the Regulations and Standards, without an Animal Welfare Act license, and sold, in commerce, one Pug, one Eskimo, four Chihuahuas, and two Bichon Frises to Puppy Love of Virginia, Inc., for resale, for use as pets.
7. On July 1, 2003, Respondent Erica Nicole deHaan operated as a dealer, as defined in the Animal Welfare Act and the Regulations and Standards, without an Animal Welfare Act license, and sold, in commerce, three Golden Retrievers and two Maltese to Puppy Love of Virginia, Inc., for resale, for use as pets.
8. On July 8, 2003, Respondent Erica Nicole deHaan operated as a dealer, as defined in the Animal Welfare Act and the Regulations and Standards, without an Animal Welfare Act license, and sold, in commerce, six Eskimos to Puppy Love of Virginia, Inc., for resale, for use as pets.
9. On July 29, 2003, Respondent Erica Nicole deHaan operated as a dealer, as defined in the Animal Welfare Act and the Regulations and Standards, without an Animal Welfare Act license, and sold, in commerce, one Basset Hound, one Bichon Frise, and two Boston Terriers to the National Breeders Association, Inc., for resale, for use as pets.
10. On August 5, 2003, Respondent Erica Nicole deHaan operated as a dealer, as defined in the Animal Welfare Act and the Regulations and Standards, without an Animal Welfare Act license, and sold, in commerce, one Chihuahua, three Pekingese, and one Cocker Spaniel to Puppy Love of Virginia, Inc., for resale, for use as pets.
11. On August 6, 2003, Respondent Erica Nicole deHaan operated as a dealer, as defined in the Animal Welfare Act and the Regulations and Standards, without an Animal Welfare Act license, and sold, in commerce, one Doberman Pinscher, one Wheaten Terrier, one Old English Sheepdog, one Shiba Inu, one Schnauzer, one Chihuahua, two Bichon Frises, four Labradors, one Cocker Spaniel, and one Wheaten Terrier to National Breeders Association, Inc., for resale, for use as pets.
12. On August 12, 2003, Respondent Erica Nicole deHaan operated as a dealer, as defined in the Animal Welfare Act and the Regulations and Standards, without an Animal Welfare Act license, and sold, in commerce, four Shih Tzus, two Golden Retrievers, one Pomeranian, one Poodle, one Dachshund, and two West Highland White Terriers to Puppy Love of Virginia, Inc., for resale, for use as pets.
13. On August 13, 2003, Respondent Erica Nicole deHaan operated as a dealer, as defined in the Animal Welfare Act and the Regulations and Standards, without an Animal Welfare Act license, and sold, in commerce, one Golden Retriever, one Pug, two Cocker Spaniels, two Boxers, one Sheltie, one Pomeranian,

³*In re H. Schnell & Co.*, 57 Agric. Dec. 1722, 1730-31 (1998) (Remand Order) (stating that oral statements made by a respondent during a conference that clearly constitute admissions of allegations in a complaint may constitute a basis for findings of fact and for issuance of a default decision).

two Shih Tzus, two Labradors, and one Poodle to National Breeders Association, Inc., for resale, for use as pets.

14. On August 13, 2003, Respondent Erica Nicole deHaan operated as a dealer, as defined in the Animal Welfare Act and the Regulations and Standards, without an Animal Welfare Act license, and sold, in commerce, one Basset Hound to Bahuaka, Inc., for resale, for use as a pet.

15. On August 13, 2003, Respondent Erica Nicole deHaan operated as a dealer, as defined in the Animal Welfare Act and the Regulations and Standards, without an Animal Welfare Act license, and sold, in commerce, five Shih Tzus to Stillwell Pets & Quality Pups, for resale, for use as pets.

16. On August 19, 2003, Respondent Erica Nicole deHaan operated as a dealer, as defined in the Animal Welfare Act and the Regulations and Standards, without an Animal Welfare Act license, and sold, in commerce, two Poodles and two Dachshunds to Puppy Love of Virginia, Inc., for resale, for use as pets.

17. On August 20, 2003, Respondent Erica Nicole deHaan operated as a dealer, as defined in the Animal Welfare Act and the Regulations and Standards, without an Animal Welfare Act license, and sold, in commerce, one Basset Hound, three Labradors, two Bichon Frises, one Poodle, two Chihuahuas, two Shih Tzus, two Golden Retrievers, and one Cocker Spaniel to National Breeders Association, Inc., for resale, for use as pets.

18. On August 21, 2003, Respondent Erica Nicole deHaan operated as a dealer, as defined in the Animal Welfare Act and the Regulations and Standards, without an Animal Welfare Act license, and sold, in commerce, one Shih Tzu to Stillwell Pets & Quality Pups, for resale, for use as a pet.

19. On August 26, 2003, Respondent Erica Nicole deHaan operated as a dealer, as defined in the Animal Welfare Act and the Regulations and Standards, without an Animal Welfare Act license, and sold, in commerce, two Yorkshire Terriers, one Sheltie, and two Chi to National Breeders Association, Inc., for resale, for use as pets.

20. On or about September 30, 2003, Respondent Erica Nicole deHaan operated as a dealer, as defined in the Animal Welfare Act and the Regulations and Standards, without an Animal Welfare Act license, and sold, in commerce, one Rat Terrier to Pets and the City, Inc., for resale, for use as a pet.

21. On or about October 6, 2003, Respondent Erica Nicole deHaan operated as a dealer, as defined in the Animal Welfare Act and the Regulations and Standards, without an Animal Welfare Act license, and sold, in commerce, six dogs, including one Sky Terrier, to Pets and the City, Inc., for resale, for use as pets.

22. On October 6, 2003, Respondent Erica Nicole deHaan operated as a dealer, as defined in the Animal Welfare Act and the Regulations and Standards, without an Animal Welfare Act license, and sold, in commerce, one Rat Terrier and one American Eskimo to United Pet Supply, Inc., for resale, for use as pets.

23. On October 7, 2003, Respondent Erica Nicole deHaan operated as a dealer, as defined in the Animal Welfare Act and the Regulations and Standards, without an Animal Welfare Act license, and sold, in commerce, three Dachshunds and one Jack Russell Terrier to Precious Pet Cottage, Inc., for resale, for use as pets.

24. On October 7, 2003, Respondent Erica Nicole deHaan operated as a dealer, as defined in the Animal Welfare Act and the Regulations and Standards, without an Animal Welfare Act license, and sold, in commerce, one Rat Terrier to PetLand, Inc., Orlando East, for resale, for use as a pet.

25. On October 14, 2003, Respondent Erica Nicole deHaan operated as a dealer, as defined in the Animal Welfare Act and the Regulations and Standards, without an Animal Welfare Act license, and sold, in commerce, two Dachshunds to Precious Pet Cottage, Inc., for resale, for use as pets.

Conclusions of Law

1. The Secretary has jurisdiction in this matter.

2. As shown by the Findings of Fact, Respondent Erica Nicole deHaan operated as a dealer, as defined in section 2(f) of the Animal Welfare Act (7 U.S.C. § 2132(f)) and section 1.1 of the Regulations and Standards (9 C.F.R. § 1.1), without an Animal Welfare Act license, in willful violation of section 4 of the Animal Welfare Act (7 U.S.C. § 2134) and section 2.1(a)(1) of the Regulations and Standards (9 C.F.R. § 2.1(a)(1)).

3. As shown by the Findings of Fact, Respondent Erica Nicole deHaan sold 128 dogs, in commerce, for resale, for use as pets, without an Animal Welfare Act license.

4. Each of the 128 dogs sold by Respondent Erica Nicole deHaan during the period April 1, 2003, through October 14, 2003, constitutes a separate violation of the Animal Welfare Act and the Regulations and Standards (7 U.S.C. § 2149(b)).

5. Each of 19 days during the period April 1, 2003, through October 14, 2003, when Respondent Erica Nicole deHaan operated as a dealer without an Animal Welfare Act license constitutes a separate violation of

the Animal Welfare Act and the Regulations and Standards (7 U.S.C. § 2149(b)).

6. The assessment of an \$18,000 civil penalty against Respondent Erica Nicole deHaan is reasonable and appropriate for her 147 violations the Animal Welfare Act and the Regulations and Standards.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Complainant raises one issue in “Complainant’s Petition for Appeal of Decision and Order and Second Decision and Order By Reason of Admission of Facts as to Erica Nicole deHaan” [hereinafter Complainant’s Appeal Petition]. Complainant appeals the \$3,480 and \$360 civil penalties the ALJ assessed against Respondent Erica Nicole deHaan and requests the assessment of an \$18,000 civil penalty against Respondent Erica Nicole deHaan.

Respondent Erica Nicole deHaan, by her failure to file an answer within 20 days after the Hearing Clerk served her with the Complaint, is deemed to have admitted the allegations in the Complaint.⁴ In addition, during a teleconference with the ALJ and counsel for Complainant, Respondent Erica Nicole deHaan admitted that she committed the violations alleged in the Complaint to have been committed by Respondent Ricky deHaan. Thus, Respondent Erica Nicole deHaan is deemed to have admitted that she committed 147 willful violations of the Animal Welfare Act and the Regulations and Standards during the period April 1, 2003, through October 14, 2003.

With respect to the civil monetary penalty, the Secretary of Agriculture is required to give due consideration to the size of the business of the person involved, the gravity of the violation, the person’s good faith, and the history of previous violations.⁵

Respondent Erica Nicole deHaan sold 128 dogs to 8 different buyers on 19 days during the period April 1, 2003, through October 14, 2003. Based on the number of dogs sold, the number of buyers, and the time during which these sales took place, I infer Respondent Erica Nicole deHaan operates a large business.

Respondent Erica Nicole deHaan’s violations are serious. The failure to obtain an Animal Welfare Act license before operating as a dealer is a serious violation because enforcement of the Animal Welfare Act and the Regulations and Standards depends upon the identification of persons operating as dealers as defined by section 2(f) of the Animal Welfare Act (7 U.S.C. § 2132(f)) and section 1.1 of the Regulations and Standards (9 C.F.R. § 1.1). Respondent Erica Nicole deHaan’s failure to obtain the required Animal Welfare Act license thwarted the Secretary of Agriculture’s ability to carry out the purposes of the Animal Welfare Act.

Respondent Erica Nicole deHaan’s willful violations on 19 days during the period April 1, 2003, through October 14, 2003, reveals a consistent disregard for, and unwillingness to abide by, the requirements of the Animal Welfare Act and the Regulations and Standards. An ongoing pattern of violations establishes a “history of previous violations” for the purposes of section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)) and a lack of good faith.

The United States Department of Agriculture’s current sanction policy is set forth in *In re S.S. Farms Linn County, Inc.* (Decision as to James Joseph Hickey and Shannon Hansen), 50 Agric. Dec. 476, 497 (1991), *aff’d*, 991 F.2d 803, 1993 WL 128889 (9th Cir. 1993) (not to be cited as precedent under 9th Circuit Rule 36-3):

[T]he sanction in each case will be determined by examining the nature of the violations in relation to the remedial purposes of the regulatory statute involved, along with all relevant circumstances, always giving appropriate weight to the recommendations of the administrative officials charged with the responsibility for achieving the congressional purpose.

The recommendations of administrative officials charged with the responsibility for achieving the congressional purpose of the regulatory statute are highly relevant to any sanction to be imposed and are entitled to great weight in view of the experience gained by administrative officials during their day-to-day supervision of the regulated industry. *In re S.S. Farms Linn County, Inc.*, 50 Agric. Dec. at 497.

Complainant seeks the assessment of an \$18,000 civil penalty against Respondent Erica Nicole deHaan

⁴See 7 C.F.R. § 1.136(c).

⁵See 7 U.S.C. § 2149(b).

and a cease and desist order (Complainant's Appeal Pet. at 5).

Respondent Erica Nicole deHaan could be assessed a maximum civil penalty of \$404,250 for her 147 violations of the Animal Welfare Act and the Regulations and Standards.⁶ After examining all the relevant circumstances, in light of the United States Department of Agriculture's sanction policy, and taking into account the requirements of section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)), the remedial purposes of the Animal Welfare Act, and the recommendations of the administrative officials, I conclude that a cease and desist order and assessment of an \$18,000 civil penalty are appropriate and necessary to ensure Respondent Erica Nicole deHaan's compliance with the Animal Welfare Act and the Regulations and Standards in the future, to deter others from violating the Animal Welfare Act and the Regulations and Standards, and to fulfill the remedial purposes of the Animal Welfare Act.

For the foregoing reasons, the following Order should be issued.

ORDER

1. Respondent Erica Nicole deHaan, her agents and employees, successors and assigns, directly or indirectly through any corporate or other device, shall cease and desist from violating the Animal Welfare Act and the Regulations and Standards, and in particular, shall cease and desist from engaging in any activity for which an Animal Welfare Act license is required without an Animal Welfare Act license.

The cease and desist provisions of this Order shall become effective on the day after service of this Order on Respondent Erica Nicole deHaan.

2. Respondent Erica Nicole deHaan is assessed an \$18,000 civil penalty. The civil penalty shall be paid by certified check or money order made payable to the Treasurer of the United States and sent to:

Bernadette R. Juarez
United States Department of Agriculture
Office of the General Counsel
Marketing Division
1400 Independence Avenue, SW
Room 2343-South Building
Washington, DC 20250-1417

Payment of the civil penalty shall be sent to, and received by, Bernadette R. Juarez within 60 days after service of this Order on Respondent Erica Nicole deHaan. Respondent Erica Nicole deHaan shall state on the certified check or money order that payment is in reference to AWA Docket No. 04-0004.

RIGHT TO JUDICIAL REVIEW

Respondent Erica Nicole deHaan has the right to seek judicial review of this Order in the appropriate United States Court of Appeals in accordance with 28 U.S.C. §§ 2341, 2343-2350. Such court has exclusive jurisdiction to enjoin, to set aside, to suspend (in whole or in part), or to determine the validity of this Order. Respondent Erica Nicole deHaan must seek judicial review within 60 days after entry of this Order. 7 U.S.C. § 2149(c). The date of entry of this Order is August 18, 2004.

⁶Section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)) provides that the Secretary of Agriculture may assess a civil penalty of not more than \$2,500 for each violation of the Animal Welfare Act and the Regulations and Standards. Pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended (28 U.S.C. § 2461 note), the Secretary of Agriculture adjusted the civil penalty that may be assessed under section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)) for each violation of the Animal Welfare Act and the Regulations and Standards by increasing the maximum civil penalty from \$2,500 to \$2,750 (7 C.F.R. § 3.91(b)(2)(v)).